No. 14867.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EULOGIO DE LA CRUZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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Jurisdiction of the Court.

Appellant brought action in the court below seeking to revoke and set aside appellant's naturalization [C. T. 2-13].[1] Jurisdiction was conferred upon the District Court by Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A., Sec. 738(a).

Since the judgment of the court below [C. T. 287-289] was a final decision, this court has jurisdiction of an appeal from that decision pursuant to Title 28, United States Code, Section 1291.

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[1]"C. T." refers to the Clerk's Transcript of Record. "R. T." refers to the Reporter's Transcript of Proceedings. References to Appellant's Opening Brief will be indicated by "Br."

Statement of the Case.

On June 5, 1952, appellee instituted action in the court below to revoke and set aside appellant's naturalization [C. T. 2-13] under the provisions of Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A., Sec. 738(a) [C. T. 2].

The complaint alleged, *inter alia,* that the appellant was naturalized on or about April 11, 1947 [Par. IV, C. T. 3]; that the appellant had been a member of the Communist Party of the United States during the years 1937, 1938, 1939 and 1940 [Par. VI, C. T. 4]; that the order admitting appellant to citizenship was procured upon the sworn statements of appellant "that during the preceding ten years he had been a member of the following organizations and no other: Cannery Workers Union, Ilocannisis Fraternity of America, Inc., and Filipino Community of the Los Angeles Harbor Area [Par. V, C. T. 3]; that this statement was false [Par. VI, C. T. 4]; that the granting of appellant's petition for naturalization and the issuance of the certificate of naturalization were fraudulently procured [Par. VII, C. T. 4].

Paragraph VII of the complaint further alleged that appellant "did conceal his membership in the Communist Party of the United States . . . to procure naturalization in violation of law." [C. T. 5.] Paragraph VIII alleged that the defendant "prevented the Immigration and Naturalization Service and the Court from determining whether or not his naturalization was prohibited by Section 305 of the Nationality Act of 1940 in that said defendant was a member of an organization which engaged in activities proscribed by that section." [C. T. 5.]

At trial, which commenced on November 30, 1954, the evidence for appellee consisted of the testimony of seven witnesses, and twenty-six exhibits.[2] Appellant, who did not personally appear in court at any stage of the trial, but who was represented by counsel, presented no witnesses. The only evidence on behalf of appellant is one exhibit [Ex. A]. In general, appellee presented evidence concerning (1) the proceedings which led to appellant's naturalization, including statements oral and written made by appellant during the course of these proceedings [R. T. 1-99]; (2) appellant's membership and activities in the Communist Party [R. T. 101-522]; and (3) the proscribed nature of the Communist Party as an organization under Section 305 of the Nationality Act of 1940 [R. T. 523-888]. No objection was raised by counsel for appellant that these categories of evidence, or either of them, were outside the scope of the issues.

During cross-examination of George B. Leckner, Preliminary Naturalization Examiner who acted upon appellant's petition for naturalization, appellant elicited that certain forms, relating to appellant, G-58 and G-59, may have been sent to the Federal Bureau of Investigation by the Immigration and Naturalization Service on or about October 26, 1946 [R. T. 50-51]. Appellant's efforts by motions [R. T. 62, 63, 76, 77] and subpoena [C. T. 168] to obtain these documents or blank copies thereof were denied [R. T. 62, 67, 77, 270; C. T. 172].

After trial had been concluded, the District Court filed its Findings of Fact and Conclusions of Law [C. T.

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[2]Twenty-eight exhibits were marked for identification, however only 26 were received in evidence, Exhibits 5 and 17 not being received.

278-286] and entered judgment revoking and setting aside the order admitting appellant to citizenship and cancelling his certificate of naturalization [R. T. 287-288]. The District Court concluded that appellant's naturalization was fraudulently [Conclusion of Law III, C. T. 284] and illegally [Conclusion of Law V, C. T. 285] procured.

Issues Presented.

1. Is there clear, convincing, and unequivocal evidence that appellant was a member of the Communist Party during 1937, or 1938, or 1939, or 1940?

2. Is there clear, convincing, and unequivocal evidence that the Communist Party, during the period of appellant's membership, was an organization proscribed by Section 305 of the Nationality Act of 1940?

3. Was the judgment of the District Court properly based upon illegal procurement as well as upon fraud?

4. Is there clear, convincing, and unequivocal evidence of appellant's intent to defraud?

5. Was appellant's personal knowledge of the proscribed nature of the Communist Party or his adherence to its views required to be proved, upon the record as presented, in order to support the judgment of the District Court?

6. Is appellant's naturalization by the United States District Court at Los Angeles, California on April 11, 1947, *res judicata,* so as to bar revocation of such naturalization?

7. Was appellant entitled to production of Forms G-58 and G-59, or blank copies thereof?

Statutes Involved.[3]

Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A., Sec. 738, provides:

> "Sec. 338. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured. * * *"

Section 305 of the Nationality Act of 1940, 54 Stat. 1141, 8 U. S. C. A., Sec. 705, provides in pertinent part:

> "Sec. 305. No person shall hereafter be naturalized as a cititzen of the United States—
>
> * * * * * * * *
>
> (b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—
>
> (1) the overthrow by force or violence of the Government of the United States or of all forms of law; or
>
> * * * * * * * *
>
> (c) Who writes, publishes, or causes to be written or published, or who knowingly circulates, distributes,

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[3]These statutes were repealed by Section 403(a)(42) of the Immigration and Nationality Act, 66 Stat. 280.

prints. or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or who knowingly has in his possession for the purpose of circulation, distribution, publication, or display any written or printed matter advising, advocating, or teaching opposition to all organized government, or advising, advocating, or teaching—

(1) the overthrow by force or violence of the Government of the United States or of all forms of law; or

* * * * * * * *

(d) Who is a member of or affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (c).

* * * * * * * *

The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses [classes] enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes. * * *"

ARGUMENT.

I.

There Is Clear, Convincing and Unequivocal Evidence That Appellant Was a Member of the Communist Party During 1938 and 1939.

A. Summary of Testimony—Ignacio Ibalio Josue.

Witness Josue testified that he joined the Communist Party around the early part of 1938 [R. T. 103-104]; that he left the party around the latter part of 1939 or the early part of 1940 [R. T. 138, 278]; that he joined the cannery workers unit of the Communist Party at Seattle, Washington [R. T. 103]; that this unit was composed of members of the Communist Party who were also members of Cannery Workers Local No. 7; that this unit had about fifteen members [R. T. 103-104]; and that he recalled as being members in addition to himself; Aniceto Manzano, David De Leon, Eulogio De La Cruz (Appellant), Joe Prudencio, Cenon Campos, Ernesto Mangaoang, Al Fajardo, Dyke Miyagawa, and George Minato [R. T. 104-105].

That meetings of the unit were held at the apartment of one Lee Blue, who was unit organizer for the cannery workers unit of the Communist Party [R. T. 105]; that the meetings were held once a week during the fall of 1938 and the early part of 1939 [R. T. 108]; and that the meetings were "closed," that is, confined only to members of the Communist Party, except when it was predetermined that new members were to be inducted [R. T. 111-112].

That during the latter part of 1938 and the early part of 1939 various members of his unit of the Communist Party also held unscheduled meetings known as "fraction"

meetings [R. T. 114-118]; that a fraction meeting was a "meeting of members of the cannery workers unit of the Communist Party wherein they meet together to discuss policies which are to be presented to any particular meeting of a union . . ." [R. T. 115]; that these fraction meetings were open only to members of the Communist Party [R. T. 118, 275].

Witness Josue identified appellant from his picture on Plaintiff's Exhibit 6 (Certificate of Naturalization) [R. T. 123] and testified that during the years 1938, 1939 and probably 1940 he occupied the same room with appellant at the Waldon Hotel, Seattle, Washington [R. T. 121, 236-237]; that appellant was nicknamed "Bob" and was sometimes called Ah Wing Lee because of his Chinese features [R. T. 121-122]; that other members of the cannery worker's unit of the Communist Party named above also lived in the Waldon Hotel; Al Fajardo and Aniceto Manzano [R. T. 137].

That appellant was present at from 5 to 8 "closed" meetings of the Communist Party at the apartment of Lee Blue in 1938 and the early part of 1939 [R. T. 123, 124, 125]; that he and appellant attended meetings together [R. T. 127-128]; that appellant took part in the discussions of the meetings [R. T. 129]; that to assure that the meetings were closed, Lee Blue usually admitted the people who came in, and that if he was not admitting them, there usually was someone detailed to let them in and recognize them as they came in [R. T. 124, 279]; and that during the meetings the door was locked [R. T. 124].

That Communist Party literature was for sale and for distribution at the meetings held at Lee Blue's apart-

ment [R. T. 126-127, 213, 280]; that Plaintiff's Exhibits 7 ("The Communist Manifesto"), 8 ("The Constitution and By-Laws of the Communist Party of the United States of America") and 9 ("What is Communism") were among the literature on display at these meetings [R. T. 127].

That during 1938 or 1939, at their room at the Waldon Hotel, he saw appellant's Communist Party membership card or book; that he and appellant showed each other their cards [R. T. 130-131]; that he discussed Communist Party membership with appellant, discussing whether certain persons were "ripe" to be taken into the party [R. T. 131, 133]; and that appellant also attended three or four "fraction" meetings around the early part of 1939 [R. T. 133-134, 272].

B. Summary of Testimony—Cenon Campos.

Witness Campos testified that he joined the Communist Party in Seattle, Washington during 1936 [R. T. 292]; that he left the party during the latter part of 1939 [R. T. 304]; that he had a Communist Party membership book [R. T. 348-349] and that he paid dues to the Communist Party [R. T. 350].

That a cannery workers unit of the Communist Party was started sometime during 1938; that this unit held its meetings at Lee Blue's place and at the Arcade Building; that 15 to 20 persons were members of that group; and that he recalled as members in addition to himself: Minato, Mangaoang, Lee Blue, Espe, Carl Belos, Ignacio Josue, Ventura, Eulogio Cruz (appellant), Torres, Ancheta, De Leon, Manzano, Bautista, and Jose Prudencio [R. T. 293].

That he attended 6 or 7 Communist Party unit meetings at Lee Blue's apartment during the latter part of 1938 and the early part of 1939; that at these meetings he sometimes changed places with Lee Blue to guard the door in order to let in "no people but those who belonged to the party" [R. T. 294].

Witness Campos identified appellant from his picture on Plaintiff's Exhibit 6 (Certificate of Naturalization) [R. T. 304]. He testified that he first met appellant at the cannery workers unit of the Communist Party, although he had known him in 1937 [R. T. 296]; that appellant was also called Ah Wing Lee because of his Chinese features [R. T. 304].

That appellant was a member of the Communist Party [R. T. 296]; that he saw appellant at unit meetings at Lee Blue's apartment during 1938 and 1939 [R. T. 297]; that these meetings were restricted to members of the Communist Party [R. T. 298]; that appellant always participated in the discussions at these meetings [R. T. 303]; and that after attending his first meeting with appellant he verified the latter's membership in the Communist Party by asking whether he was "one of us" and appellant admitted that he was [R. T. 367].

That at the meetings at Lee Blue's apartment, literature was present for sale or for distribution; that this literature consisted of "Books that contained pictures of Lenin and Stalin, or that group, the Hammer and Sickle"; that Plaintiff's Exhibit 7 ("The Communist Manifesto") was among the literature [R. T. 300].

C. Summary of Testimony—Aniceto Manzano.

Witness Manzano testified that he joined the Communist Party around the fall or winter of 1938 [R. T. 444, 464]; that he left the party around 1939 [R. T. 464]; that he received a Communist party book [R. T. 454-457]; and that he paid dues to the Communist Party [R. T. 457-458, 517, 518].

That he joined the cannery workers unit of the Communist Party, which held its meetings at Lee Blue's apartment in Seattle, Washington [R. T. 445]; that "fraction" meetings of the unit were also held in the Arcade Building [R. T. 446, 462]; that he attended from six to eight meetings at Lee Blue's house around the late part of 1938 and the early part of 1939 [R. T. 447, 448]; that from 10 to 15 persons were in attendance at these meetings [R. T. 447]; that he recalled as being in attendance, in addition to himself: Al Fajardo, Josue, De La Cruz (appellant), Cenon Campos, Pete Batista, Joe Prudencio, Max Ava, David De Leon, Conrad Espe, and Lee Blue [R. T. 447]; and that the meetings were usually held once a week [R. T. 448].

Witness Manzano identified appellant from his picture on Plaintiff's Exhibit 6 (Certificate of Naturalization) [R. T. 460]; and testified that he (the witness) lived in the Waldon Hotel, where appellant, Al Fajardo and Ignacio Josue also lived [R. T. 453]; that appellant used to dine with him in his hotel room frequently [R. T. 454]; and that appellant was called Ah Wing Lee because of his Chinese look [R. T. 459].

That he saw appellant at from six to eight "closed" meetings of the Cannery Workers unit of the Communist Party during the latter part of 1938 and the early part

of 1939 [R. T. 451-452, 513]; that a closed meeting was a meeting "solely for the Communist Party members" [R. T. 449]; that "we have a guard at the door and check that every man that enters that apartment is a member of the Communist Party" [R. T. 449]; that appellant was also present at a fraction meeting at the Arcade Building [R. T. 462-463].

That at the meetings which he attended at Lee Blue's apartment, literature was for sale or for distribution [R. T. 460]; that the literature consisted of pamphlets "that have some pictures of this insignia of the Communist Party, sickle, or some pictures of the Communist leaders" [R. T. 461]; that he recognized Plaintiff's Exhibit 7 ("The Communist Manifesto") and 9 ("What is Communism") as being among the literature present at these meetings [R. T. 461].

That he paid dues to the Communist Party during the period of 1938 and 1939 at the rate of 10 cents per month, and that when he paid dues he was given a stamp which he pasted in his Communist Party book [R. T. 457-458]; that once around the late part of 1938 or the early part of 1939, he got behind in his dues and that appellant called upon him at the Waldon Hotel to collect his dues; that he paid appellant his Communist Party dues and received from appellant stamps for the dues that he paid [R. T. 458, 516, 518].

D. Clear, Convincing and Unequivocal Nature of the Testimony.

The uncontradicted testimony of three witnesses, former members of the Communist Party, identified appellant as having been a member of the Communist Party, as having attended both unit and "fraction" meetings of the

party during 1938 and 1939, which meetings were restricted solely to members of the party, as having had a Communist Party book which he showed to witness Josue [R. T. 130-131], as having discussed taking recruits into the Communist Party [R. T. 131, 133], as having admitted membership to witness Campos [R. T. 367], and as having collected Communist Party dues from witness Manzano, giving him stamps in return [R. T. 458, 516, 518].

Confronted with this testimony appellant remained silent.[4] He did not testify in his own behalf, nor did he offer any evidence to refute the evidence of his membership in the Communist Party. While in a civil proceeding an inference may be drawn from the failure of a party to produce evidence which it is within his power to produce (*Local 167 v. United States,* 291 U. S. 293, 298 (1934); *United States ex rel. Vajtauer v. Commissioner of Immigration,* 273 U. S. 103, 111-113 (1927); *Bilokumsky v. Tod,* 263 U. S. 149 (1923); *Kirby v. Tallmadge,* 160 U. S. 379, 382 (1896); *Hyun v. Landon,* 219 F. 2d 404, 409 (C. A. 9, 1955), affirmed 24 L. W. 3252; Wigmore on Evidence, 3d Ed., Vol. II, Secs. 285-289), resort need not be had to such inference in the case at bar. Without it, there is clear, convincing and unequivocal evidence of appellant's membership in the Communist Party.

Appellant's contention that the mere passage of time necessarily renders testimony unreliable (Br. 11), while

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[4]While appellant did not personally appear in court at any stage of the proceedings, he had the privilege of being present; but for reasons of his own, chose not to exercise this privilege [See, R. T. 9-10].

obviously incorrect as a rule of law, is here inapplicable as a permissible inference of fact. The relationship of witnesses Josue, Campos, and Manzano to appellant was such that the lapse of time here involved was not likely to dim their memories as to the *essential facts* concerning appellant's membership in the Communist Party. These witnesses were on intimate terms with appellant. Witness Josue lived in the same hotel room with him for about three years [R. T. 121, 236-237] and the two went to Communist Party meetings together [R. T. 127-128]. Witness Manzano also lived in the same hotel as appellant, and the latter frequently dined in Manzano's room [R. T. 453-454]. All three witnesses knew appellant by his nickname [R. T. 121-122, 304, 459]. These witnesses were not likely to soon forget their mutual acquaintance with appellant and their membership with him in the Communist Party. This is demonstrated by the fact that each witness was able to name a large proportion of the members of the cannery workers unit of the Communist Party [R. T. 104-105, 293, 447].

Appellant's contention that the testimony of the witnesses was unreliable because they themselves were subject to denaturalization and because they were former members of the Communist Party (Br. 12-13) is likewise without merit. The witnesses' liability to denaturalization is speculation, which it was improper to resolve in the District Court, since determining their liability to denaturalization along with that of the appellant, would have raised innumerable collateral issues. As to the witnesses' membership in the Communist Party, the court in *United States v. Politics,* 127 Fed. Supp. 768 (E. D. Mich., 1953), declared (p. 771):

> "After the above evidence was introduced, defendant made no denial but contents himself now,

through counsel, with questioning the reliability of testimony given by men who were formerly Communists. Our answer to that is, *'Where better can the government go but to those who have previously participated in the disloyalty?'* * * *" (Emphasis added.)

The language of *Bridges v. United States,* 199 F. 2d 811, 836 (C. A. 9, 1952), reversed on other grounds, 346 U. S. 209, concerning the evidentiary value of attendance at "closed" meetings of the Communist Party cannot be lifted out of context and applied to the case at bar. In the *Bridges* decision, Bridges himself, a labor union leader, took the stand and admitted attendance at Communist Party meetings and admitted that his union was offered and accepted aid from the Communist Party and its paper "The Daily Worker" (199 F. 2d 836-837). Such evidence of cooperation between Bridges' union and the Communist Party might well have explained Bridges' presence at meetings of the Communist Party, ordinarily closed, consistent with non-membership. In the case at bar, however, appellant gave no explanation of why he found himself at closed meetings of the Communist Party.

Appellant seems to contend that in order that his membership in the Communist Party may be established, it must be proved that he complied with all the formal requirements of membership as set forth in the Constitution of the Communist Party of the United States. The fallacy of this argument is two-fold. In the first place, it assumes that Congress, in proscribing membership in a designated organization, intended to be bound by all of the requirements such organization might see fit to lay down for membership. For example, Article III, Section 2 of the Constitution of the Communist Party of the

United States of America [Pltf. Ex. 8] provides that "A Party member is one who accepts the Party program. . . ." Yet, the Supreme Court in *Galvan v. Press,* 347 U. S. 522 (1954), citing with approval the earlier cases of *Kjar v. Doak,* 61 F. 2d 566 (C. C. A. 7, 1932) and *Greco v. Haff,* 63 F. 2d 863 (C. C. A. 9, 1933), made it clear that acceptance of the party program was not a prerequisite of membership within the intent of Congress.

In the second place, appellant's argument is erroneous in that it seeks to equate all of the requirements of membership with proof of membership. Of course, compliance with the requirements for membership as laid down by an organization would be evidence of membership, but certainly it was never intended that performance of each of such requirements to the letter had to be proved before membership could be established. *Fisher v. United States,* No. 14-731 ..... F. 2d ..... (not yet reported), decided by this court on February 15, 1956, does not so hold. That case merely required that the jury be given the "components of the term membership", rather than a dictionary definition, to aid it in its determination of whether the defendant was a member. The language of the court in the *Fisher* case is illuminating:

> *"Membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization.* Moreover certain actions are usually required such as paying dues, attending meetings and doing some of the work of the group. These were the factors mentioned in the Supreme Court's opinion in *Galvan v. Press,* 347 U. S. 522, 528-529 (1954) where the court considered whether the evidence justified the conclusion that a certain person was a member of the Communist Party.

> Congress in the Communist Control Act of 1954 indicates twelve types of evidence *which a jury may consider* to determine the question of membership. 50 U. S. C. §844. Analyzed carefully they break down into *acts of the individual indicating a desire to belong, acts of acceptance by the organization, and various contributions of funds or services to the organization.* * * *" (Emphasis added.)

In the instant case, enough "components" of membership were established to constitute clear, convincing and unequivocal evidence of "a desire on the part" of appellant "to belong to" the Communist Party and an "acceptance by" the party.

II.

There Is Clear, Convincing and Unequivocal Evidence That the Communist Party, During the Period of Appellant's Membership, Was an Organization Proscribed by Section 305 of the Nationality Act of 1940.

Section 305 of the Nationality Act of 1940, which was in effect at the time appellant was naturalized on April 11, 1947, prohibited the naturalization of any person who had, within ten years prior to filing his petition for naturalization, been a member of an organization that "believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government of the United States". This section also prohibited the naturalization of any person who had, within ten years prior to filing his petition for naturalization, been a member of an organization that "writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publi-

cation, issue, or display, any written or printed matter" advising, advocating, or teaching the overthrow by force or violence of the Government of the United States. The record contains clear, convincing and unequivocal evidence that the Communist Party of the United States, during 1938 and 1939 fell within the proscription of Section 305. Two witnesses testified concerning the proscribed nature of the Communist Party.

A. Summary of Testimony—William Ward Kimple.

Witness Kimple, a retired police officer [R. T. 523], testified that he joined the Communist Party in Los Angeles, California, during 1928 as a part of his official duties as a police officer and that he remained in the party in this capacity until the fall of 1939 [R. T. 524]; that while a member of the party he held the positions of unit literature agent, unit educational director, unit organizer, assistant to the Los Angeles County membership director, and alternate on the disciplinary committee [R. T. 525]; that as educational director in the unit, he would lead discussions in the unit and also organize the sale of literature [R. T. 527]; and that his duties as literature agent entailed the sale and distribution of Communist Party literature, newspapers, periodicals, books, and pamphlets [R. T. 527].

That during his membership in the Communist Party he came in contact with other Communist Party functionaries and had discussions with them concerning the Communist Party [R. T. 526]; that he attended Communist schools, classes and educational lectures practically every year that he was in the Communist Party [R. T. 526]; that he attended classes during 1937 and 1938 held in homes in the Hollywood area; that some of these classes were taught by Doug Jacobs, Comrade Levin, Lyons, Frank Specter,

and Rose Bush, functionaries in the Communist Party [R. T. 529]; that from the functionaries with whom he came in contact, and from whom he took classes, he learned the aims and purposes of the Communist Party [R. T. 529-530].

That he was taught that the aims of the Communist Party were for the overthrow of the existing capitalist state and the forming of a communist state by the use of force and violence [R. T. 532]; that, in the words of the witness:

> "We were taught in the Communist Party that the capitalist state would never relinquish its possession of the state, and the means of production, without the use of force; *and that it would be necessary for the Communist Party to use force in taking the state from the capitalists.*" (Emphasis added.)

Witness Kimple identified plaintiff's exhibits 7 through 21 and 23 through 28 as official publications of the Communist Party and as having been sold, or distributed, or used by the party [R. T. 547-593].

B. Summary of Testimony—Nathaniel Honig.

Witness Honig testified that he joined the Communist Party in 1927 and remained a member until September, 1939 [R. T. 744]; that from 1927 to March, 1930 he was a member of the staff of the Daily Worker in New York, "the official publication of the Communist Party of the United States" [R. T. 744]; that from March, 1930 to May, 1934, he was editor of the Labor Unity as part of his official duties in the Communist Party [R. T. 745, 746]; that from May, 1934 to September, 1935 he was representative of the American Communist Party to the Red Communist International labor union in Moscow, Russia [R. T. 746]; that he was sent to Russia as a

representative by the Central Committee of the Communist Party of the United States [R. T. 747], and that he received his instructions from Jack Stachel, who was a member of the Political Bureau of the Communist Party, from Earl Browder, who was the secretary of the Communist Party, and from a representative of the Communist International in the United States at that time [R. T. 748-749]; that from his return to the United States until April, 1946 he was a functionary in the district headquarters of the New York district of the Communist Party [R. T. 746]; that from April, 1936 to September, 1937, he was labor editor of the Western Worker in San Francisco [R. T. 746], "which was the official organ of the Communist Party of California", being succeeded by the People's World [R. T. 752]; that from September, 1937 to September, 1939, in Seattle, Washington, he was a member of the District Executive Committee of the Communist Party in the northwest district, and became educational director of the Communist Party there [R. T. 746-747]; that as educational director he also taught classes in workers' schools in Seattle [R. T. 753]; that prior to his trip to Moscow he had taught Communist Party schools in New York [R. T. 758]; that on his return from Russia in 1935, which took 40 days, he was accompanied by William Z. Foster, who was head of the Communist Party in the United States; that during this trip he had discussions with Foster, whom he knew personally, concerning Communist Party activities and the aims and purposes of the Communist Party [R. T. 755-757]; that the aims of the Communist Party during 1938 and 1939 were in the language of the witness [R. T. 759-760]:

> "The Witness: The first aim of the Communist Party at that period was—it was called its ultimate aim by the party—*to establish a Soviet America* by

peaceful means, if possible, *but if not possible by the use of force;* and, the second aim of the Communist Party of the United States in this period was to *agitate, stir up the masses of the American people,* particularly those who were members of trade unions and those who were working in industry, plants, factories, *to the extent that they would become discontented with the existing system in the United States* of the governmental system in the United States; and this was to be done by means of strikes, by recruiting of these people to the Communist Party, by various methods of propaganda. The third aim of the Communist Party of the United States at that period—I am just giving them in order of the importance—I am just giving the major aims—the third aim, then, was by various practical maneuvers to bring about, first, stirring up the masses of people; and then, of course, through that establishing the Soviet America." (Emphasis added.)

That his duties as educational director in Seattle were to be in charge of propaganda issued by the Communist Party of the Northwest district; and to draw up outlines for courses and classes to be given in the workers school of the Communist Party in the Seattle district, and that in the performance of those duties he came in contact with the literature and material to be used in the teaching in those schools [R. T. 764]. Witness Honig identified plaintiff's exhibits 7 through 8, 10 through 12, 14 through 16, and 18 through 27 [R. T. 766, 768] as documents published by publishing firms which were part of the Communist Party, as in circulation in the Communist Party, obtainable in Communist Party bookstores, as being sold and distributed in Communist Party units, and as being used by him in drawing up outlines for the workers' school classes [R. T. 767-768, 769].

C. Clear and Convincing Nature of Testimony.

The evidence discussed above constitutes clear, convincing, and unequivocal evidence that during 1938 and 1939 the Communist Party of the United States believed in and advocated the overthrow by force or violence of the Government of the United States, as well as circulated literature advocating such overthrow. The latter proposition is supported by the literature itself [Pltf. Exs. 7-28]. Since the record contains excerpts from these exhibits [C. T. 190-201; R. T. 556-557; 565, 566-567, 573-574, 583-585, 589-590, 591-592, 594-597, 598, 604-608], none will be included in this brief. The opinion of Judge Yankwich in *United States v. Title,* 132 Fed. Supp. 185 (S. D. Cal., 1955) contains an exhaustive discussion of the literature of the Communist Party, including some of the exhibits in the present case.

Schneiderman v. United States, 320 U. S. 269 (1943), dealt with the aims and purposes of the Communist Party in 1927, and cannot control the case at bar. Were the *Schneiderman* case to be again decided today, the Supreme Court would undoubtedly do so in the light of Congressional findings [Sec. 1 of the Internal Security Act of 1950, 66 Stat. 987]; its own more recent pronouncements (*Galvan v. Press,* 347 U. S. 522 (1954); *Harisiades v. Shaughnessy,* 342 U. S. 580 (1952); *Carlson v. Landon,* 342 U. S. 524 (1952)); and the latest judicial findings of inferior tribunals in denaturalization cases (*Sweet v. United States,* 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U. S. 817; *United States v. Polites,* 127 Fed. Supp. 768 (E. D. Mich., 1953); *United States v. Chruszczak,* 127 Fed. Supp. 743 (W. D. Ohio, 1954); *United States v. Title, supra.*)

III.

The Judgment of the District Court Was Properly Based Upon Illegal Procurement as Well as Upon Fraud.

At this point appellee deems it appropriate to note that the District Court revoked appellant's naturalization, not only upon the ground of fraud, but also upon the ground that such naturalization was illegally procured [see Conclusion of Law V, C. T. 285]. Illegal procurement as a ground for denaturalization was specifically authorized by Section 338(a) of the Nationality Act of 1940,[5] and while the Immigration and Nationality Act of 1952 omits this ground for denaturalization,[6] the present action having been filed on June 5, 1952, before the repeal of the 1940 Act,[7] was preserved by the savings clause contained in the 1952 Act.[8]

As previously mentioned in Point II above, Section 305 of the Nationality Act of 1940 prohibited the naturalization of an alien who within ten years immediately preceding the filing of his petition for naturalization had been a member of an organization described therein. Since it was

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[5]Section 338(a): ". . . on the ground of fraud *or on the ground that such order and certificate of naturalization were illegally procured.*" (Emphasis added.)

[6]See, Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U. S. C. A., Sec. 1451(a).

[7]The Nationality Act of 1940 (Act of Oct. 14, 1940) was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952 (See, Sec. 407 of the Immigration and Nationality Act, 66 Stat. 281).

[8]Section 405(a) of the Immigration and Nationality Act, 66 Stat. 280, 8 U. S. C. A., note following Section 1101, provides in pertinent part: "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect any prosecution, suit, action, or proceedings, civil or criminal, brought . . . at the time this Act shall take effect. . . ."

established that appellant was a member of the Communist Party during 1938 and 1939, and that the Communist Party during these years engaged in activities proscribed by Section 305, the evidence discussed in Points I and II above alone, is sufficient to support the judgment of the District Court on the ground of illegal procurement, irrespective of the elements of fraud.

Appellant urges that "'illegal procurement' was not pleaded nor was it within the issues framed by the pretrial order", relying upon *Schneiderman v. United States,* 320 U. S. 118, 160 (1943) (Br. 25). While the *Schneiderman* decision would seem to support appellant's position, "each case should be allowed to stand upon its own bottom" (*Mar Gong v. Brownell,* 209 F. 2d 448, 453 (C. A. 9, 1954)). Counsel for appellee does not have available for reference all of the allegations made in the *Schneiderman* complaint; however, the complaint in the case at bar, although based primarily upon fraud, would seem to contain sufficient allegations to inform the appellant of the charge of illegal procurement. Appellant's membership in the Communist Party during 1937, 1938, 1939, and 1940 is specifically alleged in the complaint [Par. VI, C. T. 4]. Paragraph VII alleges that appellant "did conceal his membership in the Communist Party . . . *to procure naturalization in violation of law*" (Emphasis added) [C. T. 5]. Paragraph VIII alleges that the defendant "prevented the Immigration and Naturalization Service and the Court from determining whether or not his naturalization was prohibited by Section 305 of the Nationality Act of 1940 *in that said defendant was a member of an organization which engaged in activities proscribed by that section*" (Emphasis added) [C. T. 5]. These allegations, it is submitted, gave appellant notice of the fact that the

government was proceeding upon the charge of illegal procurement as well as upon fraud.

Nor can it be said that illegal procurement was not within the issues of the case. Both the pleadings [C. T. 4, 16] and the Pre-Trial Order [C. T. 57] place appellant's membership in the Communist Party during 1937, 1938, 1939 and 1940, in issue; and while the proscribed nature of the Communist Party was not specifically mentioned in the Pre-Trial Order, both court and counsel undoubtedly regarded it as an issue, since 365 pages of testimony [R. T. 523-888] and 22 exhibits were devoted to the point. These exhibits were shown to appellant before trial [R. T. 4], and counsel for appellant during the course of the trial referred to the proscribed nature of the Communist Party as "one of the ultimate issues to be determined in the case" [R. T. 535-536].

It is submitted therefore that the Court below properly revoked appellant's naturalization upon the ground of illegal procurement as well as fraud.

IV.

There Is Clear, Convincing and Unequivocal Evidence of Appellant's Intent to Defraud.

The gist of appellant's fraud is that he intentionally concealed the fact that he had been a member of the Communist Party of the United States, thereby inducing the naturalization examiners, without further investigation of his qualifications for citizenship, to make an unconditional recommendation to the court that his petition for naturalization be granted. Where such fraud is practiced, citizenship may be revoked (*Knauer v. United States,* 328 U. S. 654 (1946); *Johannessen v. United States,* 225 U. S. 227 (1912); *Luria v. United States,* 231 U. S. 9 (1913);

Corrado v. United States, 227 F. 2d 780 (C. A. 6, 1955); *Sweet v. United States,* 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U. S. 817, affirming the following District Court cases: *United States v. Charnowola,* 109 Fed. Supp. 810 (E. D. Mich., 1953); *United States v. Sweet,* 106 Fed. Supp. 625 (E. D. Mich., 1952), and *United States v. Chomiak,* 108 Fed. Supp. 527 (E. D. Mich., 1952)).

The first step in appellant's concealment commenced on August 30, 1946, when he "filled out and signed an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization, Form N-400, together with information sheet attached thereto [Ex. 1], which was filed with the Los Angeles District Office of the United States Immigration and Naturalization Service on or about November 4, 1946" [see, Pre-Trial Order, where these facts are admitted—C. T. 56]. On the reverse side of the information sheet attached to Exhibit 1, above appellant's signature, appears the following:

> "The following is a complete list of *all* the organizations of every kind and description which I am now a member of or affiliated with, and which I have been member of or affiliated with during the last ten (10) years, together with the dates or approximate dates marking the periods of my membership or affiliation:
>
> | Name of Organization | Address of Organization | From | To |
> |---|---|---|---|
> | Cannery Worker Union | Seattle, Wash. | 1937 | 1946 |
> | Ilocannisis Fraternity of America Inc. | San Pedro, Cal. | 1939 | 1946 |
> | Filipino Community of the L. A. Harbor Area | Long Beach, Cal. | 1945 | 1946 |
>
> Date Aug. 30, 1946
>
> /s/ Eulogio dela Cruz
> Signature of Applicant"

Thus, appellant in his own handwriting listed the Cannery Workers Union, Seattle, Washington, of which he had been a member from 1937 to 1946, but did not list the Communist Party of which he had been a member at the same place during 1938 and 1939. This indicates that appellant in filling out this form intended to conceal his Communist Party membership, since he was required to give *"all* the organizations of every kind and description . . ." As to the information sheet attached to Exhibit 1, there can be no complaint that "memory of events long past become clouded" (Br. 19-20), since a written memorial bearing appellant's own handwriting and signature remains as mute evidence to condemn him.

The second step in the process of concealment occurred on February 26, 1947, when appellant appeared before Preliminary Examiner George B. Leckner and testified under oath [R. T. 23] that the list of organizations appearing on the information sheet quoted above were the only "clubs, societies or organizations that he had been connected with or affiliated with in any way, shape, form, in the past 10 years" [R. T. 27]. The third step occurred when appellant reiterated under oath [R. T. 81] this false information to Designated Examiner Ernest G. Woodward [R. T. 82], whose duty it was to review Leckner's work to see that he hadn't missed anything, by reexamination of the petitioner and his witnesses [R. T. 81].

The testimony of examiners Leckner and Woodward was not, as appellant contends (Br. 19), based exclusively upon their "invariable practice". The witnesses' signatures, check marks, initials, and numbers in their own handwriting, constitute evidence of past recollection recorded (see, Wigmore on Evidence, 3d Ed., Vol. III, Secs. 734-755), which combined with their invariable practice or custom (see, Wigmore on Evidence, 3d Ed., Vol. I, Secs. 92-98)

to render the fact that the questions were asked and the answers given almost a mathematical certainty. The testimony of naturalization examiners, even though they have no independent recollection of the petitioner, has been held to constitute clear, convincing and unequivocal evidence justifying revocation of naturalization (*Corrado v. United States,* 227 F. 2d 780, 782 (C. A. 6, 1955), affirming *United States v. Corrado,* 121 Fed. Supp. 75, 78-79 (E. D. Mich., 1953)). In *Cufari v. United States,* 217 F. 2d 404 (C. A. 6, 1955), upon which appellant lies, *the naturalization examiners were deceased,* and others sought to identify their notations and testify as to the invariable practice of the deceased examiners.

Exhibit 2 ("Continuation Sheet—RESULT OF EXAMINATION") is weighty evidence that appellant was asked concerning the list of organizations which he had furnished and that he had affirmed the correctness of the information contained on the reverse side of information sheet attached to Exhibit 1. Exhibit 2 was prepared by examiner Leckner at the time of his examination of appellant [R. T. 25], and as its title indicates was used to show the results of such examination. Leckner testified that he always asked petitioners for naturalization "what clubs, societies or organizations they had been connected or affiliated with in any way, shape, form, in the past 10 years" [R. T. 27]; and his initials [R. T. 28] appearing in the column "Clear" after item 15 on Exhibit 2, "List Organizations" shows that he did so in the case of appellant.

Examiner Woodward used red ink to identify it as his own and to show that he had reviewed the examination by the preliminary examiner and had "questioned the petitioner and the witnesses" [R. T. 80]. He testified that it

was his invariable practice to "ask every petitioner appearing before me if this list constituted all of the organizations, societies and clubs to which he had belonged the last ten years prior to the time of his appearance before me" [R. T. 82]. The fact that he did so in the case of appellant is shown by his check mark in red across Leckner's initials in the column "Clear", following Item 15 of Exhibit 2, "List Organizations", and by his signature in red on Exhibit 2. Woodward testified that a check mark indicated that he had reviewed Leckner's work by re-examination of both the witnesses and the petitioner [R. T. 80-81].

Both examiners recommended that appellant's petition for citizenship be granted [R. T. 33, 85; Ex. 4]; and neither would have made such recommendation had he learned or had reason to believe that appellant had been a member of the Communist Party. Instead they would have put a hold on the case for further investigation [R. T. 29-30, 33-34, 85]. Both naturalization examiners were aware on February 26, 1947 of the duty imposed upon them by 8 C. F. R. 352.3 to investigate the petitioner and his witnesses to determine whether the petitioner had been a member of an organization proscribed by Section 305 of the Nationality Act of 1940 [R. T. 32, 84]; and there is a presumption that they performed this duty (*United States v. Chemical Foundation,* 272 U. S. 1, 14-15 (1926); *Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 381-382 (C. A. 9, 1948), cert. den. 335 U. S. 853). The testimony of the examiners and the notations made by them supports this presumption.

Appellant was fully aware that he had been a member of the Communist Party during 1938 and 1939. Having attended "closed" meetings where Communist Party lit-

erature was present, having received a membership book, having discussed with another member whether certain persons were "ripe" for membership, having admitted membership to one of plaintiff's witnesses, and having collected dues from a fellow member, appellant's suggestion that he "may have felt" that he was never a member (Br. 22) merits no consideration. Nor does his speculation that it was "entirely possible" that appellant believed that the Communist Party should not be listed (Br. 23); since the information sheet called for *"all* the organizations of every kind and description", and since the naturalization examiners asked questions to the same effect [R. T. 27, 82]. Appellant's failure to disclose his membership, under these circumstances, is weighty evidence of his intent to defraud.

Thus, there is clear, convincing and unequivocal evidence of appellant's intent to defraud (*Baumgartner v. United States,* 320 U. S. 665; *Schneiderman v. United States,* 320 U. S. 118 (1943)). In the *Baumgartner* and *Schneiderman* cases the defendants took the stand and explained away the allegedly incriminating statements, whereas in the case at bar the appellant did not. Even in criminal cases it has been held that

> . . . where the party having the burden makes a probable case on an issue as to which the accused has peculiar knowledge of the facts and may easily prove them and the prosecution cannot, an inference arises that the truth is with the prosecution. (*Williams v. United States,* 170 F. 2d 319, 322 (C. A. 5)).

And as Justice Clark pointed out in *Holland v. United States,* 348 U. S. 121 (1954), also a criminal case (pp. 138-139): "Once the Government has established its case, the defendant remains quiet at his peril."

V.

Neither Appellant's Personal Knowledge of the Proscribed Nature of the Communist Party nor His Adherence to Its Views Was Required to Be Proved, Upon the Record as Presented, in Order to Support the Judgment of the District Court.

A. Illegal Procurement.

"Illegal procurement" as a basis for denaturalization is predicated upon the theory that the statutory requirements for naturalization have not been complied with—that naturalization is prohibited by the then existing law. It is well settled that where naturalization has been obtained despite a statutory prohibition, it may be revoked (*United States v. Ginsberg,* 243 U. S. 472 (1917); *United States v. Ness,* 245 U. S. 319 (1917); *Maney v. United States,* 278 U. S. 17 (1928); *United States v. Chomiak,* 108 Fed. Supp. 527 (E. D. Mich., 1952), affirmed *sub nom. Sweet v. United States,* 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U. S. 817; *United States v. Polites,* 127 Fed. Supp. 768 (E. D. Mich., 1953)).

In *United States v. Ginsberg, supra,* which has never been overruled, this theory was carried to its ultimate extreme. In that case Ginsberg had been admitted to citizenship in the judge's chambers despite the statutory injunction that the naturalization hearing must take place in open court. The Supreme Court concluded that by reason of this fact his naturalization had been illegally procured and directed its revocation. In doing so, it declared (p. 475):

> *"No alien has the slightest right to naturalization unless all statutory requirements are complied with;* and every certificate of citizenship must be treated as granted upon condition that the Government may

challenge it as provided in §15 and demand its cancellation unless issued in accordance with such requirements. *If procured when prescribed qualifications have no existence in fact it is illegally procured;* a manifest mistake by the judge cannot supply these nor render their existence non-essential. * * *" (Emphasis added.)

Similarly, if appellant was naturalized at a time when his naturalization was prohibited by Section 305 of the Nationality Act of 1940, "it was illegally procured." It was not necessary to prove that appellant knew the aims and purposes of the Communist Party, or subscribed to them. It was only necessary to prove that (1) appellant was a member of the Communist Party within ten years immediately preceding the filing of his petition for naturalization, and (2) that the Communist Party, during the period of appellant's membership therein was an organization proscribed by Section 305. As the Court said in *United States v. Polites, supra,* at page 770:

> "It then only becomes necessary for plaintiff to prove that the Communist Party of the U. S. at the time defendant was a member, did advise, advocate or teach overthrow of this government by force or violence. *It is not necessary to prove that defendant had knowledge of the objectives of the Communist Party of the U. S.* If he was a member of that party, within the statutory ten year period, which he admits, and it develops that such organization was then advising, advocating or teaching forcible or violent overthrow of this government, he was not then eligible for citizenship, the prohibition being jurisdictional." (Emphasis added.)

And as the Court pointed out in *United States v. Chomiak, supra,* at page 528:

> "The defendant herein procured naturalization *when the prescribed qualification of nonmembership in a cetrain type of organization did not exist in fact,* and his naturalization was therefore illegally procured. and must therefore be ordered revoked. 8 U. S. C. A. §738(a). . . ." (Emphasis added.)

Appellant's reliance upon *Wieman v. Updegraff,* 344 U. S. 183 (1952), is misplaced. The *Updegraff* decision involved the power of a state to bar persons from its employment on the basis of innocent membership, while the present case involves the right of an alien to naturalization when he does not meet the statutory requirements. As the Supreme Court pointed out in *United States v. Ginsberg, supra:* "No alien has the slightest right to naturalization unless all the statutory requirements are complied with" (245 U. S. at p. 475). Ginsberg was innocent, the mistake having been made by the judge, yet his naturalization was revoked.

Appellant's "innocence" in the instant case, however, must be evaluated in the language of the Supreme Court in *Harisiades v. Shaughnessy,* 342 U. S. 580 (1952), at page 593:

> "During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, *a category repeatedly held to include the Communist Party.*" (Emphasis added.)

B. Fraud.

Appellant's fraud, as found by the District Court, consisted in essence of his concealment of his membership in the Communist Party [R. T. 278-286]. The materiality of such concealment lies in the fact that it prevented a full and proper investigation of his qualifications for citizenship. To support the judgment of the court below on the ground of fraud, therefore, the record need not show that appellant was aware of or subscribed to the aims and purposes of the Communist Party, or even show that the Communist Party was an organization proscribed by Section 305 of the Nationality Act of 1940; although the record amply establishes the latter point. The record need only show that further investigation was prevented. (*Corrado v. United States,* 227 F. 2d 780, 784 (C. A. 6, 1955); affirming *United States v. Corrado,* 121 Fed. Supp. 75, 78 (E. D. Mich., 1953); *United States v. Genovese,* 133 Fed. Supp. 820 (D. N. J, 1955); *United States v. Accardo,* 113 Fed. Supp. 783 (D. N. J., 1953), affirmed 208 F. 2d 632, cert. den. 347 U. S. 952; *United States v. Marcus,* 1 Fed. Supp. 29 (D. N. D., 1932); *cf. Del Guercio v. Pupko,* 160 F. 2d 799 (C. A. 9, 1947)).

As the court declared in *Corrado v. United States, supra* (p 784):

> "Upon analysis, *the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship.* How could any Government official or witness say whether or not citizenship would have been

denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. * * *" (Emphasis added.)

Thus, appellant's contention that materiality requires concealment of a fact which had it been known would have disqualified him for citizenship (Br. 35), while here unimportant in view of the convincing evidence of the proscribed nature of the Communist Party, is unsound. The inapplicability of *United States v. Kessler,* 213 F. 2d 53, upon which appellant relies, to the instant case was explained in *Corrado v. United States, supra* (p. 783).

VI.

The Appellant's Naturalization by the United States District Court at Los Angeles, California, on April 11, 1947 Is Not Res Judicata so as to Bar Revocation of Such Naturalization.

Revocation of naturalization has been a part of our law since the Act of June 29, 1906, 54 Stat. 596, 601. It was reenacted as Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A., Sec. 738(a); and appears again in the present law as Section 340 of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A., Sec. 1451. Numerous decisions of the Supreme Court, as well as other courts, have upheld decrees revoking naturalization, and the Supreme Court in denying certiorari in *Sweet v. United States,* 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U. S. 817, has upheld three such decrees as recently as October 14, 1954. Considering this background, appellant's contention that the

judgment of the naturalization court, admitting him to cititzenship, is *res judicata* merits little attention (*Knauer v. United States,* 278 U. S. 17, 23 (1928); *United States v. Ness,* 245 U. S. 319, 325-327 (1917); *Maney v. United States,* 287 U. S. 17, 23 (1928); *United States v. Ginsberg,* 243 U. S. 472, 475 (1917); *Johannessen v. United States,* 225 U. S. 227, 238 (1912); *United States v. Bridges,* 123 Fed. Supp. 705 (N. D. Calif., 1954); *United States v. Holtz,* 54 Fed. Supp. 63, affirmed 162 F. 2d 716, cert. den. 322 U. S. 837; *United States v. Unger,* 26 F. 2d 114, 116 (S. D. N. Y., 1928)).

In *Maney v. United States,* 278 U. S. 17 (1928), a decree of the District Court admitting an applicant to citizenship was held not to be *res judicata* as against a subsequent revocation proceeding, even though the United States had objected to naturalization before the naturalization court. The *Maney* case was decided after *Tutun v. United States,* 270 U. S. 568, holding judgments of naturalization to be appealable.

The dicta in *Knauer v. United States,* 328 U. S. 654, 670 (Br. 38), wherein the Supreme Court declined to decide a matter which was not before it, cannot be deemed to overrule its long line of prior decisions holding that decrees of naturalization are not *res judicata,* so as to prevent revocation, either for fraud or for illegality. As far as revocation of naturalization is concerned, there is no distinction between intrinsic or extrinsic fraud (*United States v. Siegel,* 152 F. 2d 614, 615 (C. C. A. 2, 1945), cert. den. 328 U. S. 868).

VII.

Appellant Was Not Entitled to Production of Forms G-58 and G-59, or Blank Copies Thereof.

During cross-examination of Preliminary Examiner Leckner, appellant elicited testimony that certain forms, relating to appellant, G-58 and G-59 were sent to the Federal Bureau of Investigation by the Immigration and Naturalization Service on or about October 26, 1946 [R. T. 50-51]. Appellant now complains that the refusal of the District Court to order production of these forms and/or blank copies thereof wrongfully denied him the opportunity of showing that the "government" was not deceived. He urges that "if for example prior to February 26, 1947, the date of filing of the Petition for Naturalization, the Government knew that appellant was a member of the Communist Party in the years 1938 and 1939 but nevertheless decided to recommend citizenship it may not now seek to revoke citizenship for that membership" relying upon *United States v. Anastasio,* 226 F. 2d 912 (C. A. 3, 1955), (Br. 38-39).[9]

At the outset. it should be noted that it is immaterial to the issue here involved what other agencies of the government, or even the Immigration and Naturalization Service, may have known at the time appellant filed his petition for naturalization. It was the *naturalization examiners* who relied upon appellant's false statements and recommended that his petition be granted [R. T. 33, 85; Ex. 4] and it was their reliance alone which led

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[9]It should be noted that a petition for certiorari was filed in the *Anastasio* case raising two questions, one of which is as follows (24 L. W. 3273): "(1) Does naturalization examiner's recommendation, with knowledge of alien's fraud, that alien be admitted to citizenship, preclude subsequent denaturalization suit."

to appellant's naturalization without further investigation. The fallacy of imputing to officials of the government charged with performing a particular function, information which may be found in government files, even of the same agency, has been judicially exposed (*Kiefer v. United States,* 228 F. 2d 448 (C. A. Dist. Col., 1955), cert. den. 24 L. W. 3183; *Clohesy v. United States,* 199 F. 2d 475 (C. A. 7, 1952)).

Both naturalization examiners testified, in effect, that at the time they examined appellant and recommended that his petition be granted, they had no knowledge of his membership in the Communist Party; that had they had any knowledge of such membership, they would not have recommended that his petition be granted, but would have marked the case "hold" for further investigation [R. T. 29-30, 33-34, 85]. Designated Examiner Woodward testified that had there been any F. B. I. reports in the file he would have read them [R. T. 915]. This testimony is sufficient to establish reliance.

Appellant's request for the production of forms G-58 and G-59, therefore, must be appraised from the standpoint of impeachment; since, even if these forms could have been located, and even if they contained all of the information that appellant hoped that they would contain; and even if appellant could have shown that the forms had been returned to the Immigration and Naturalization Service prior to February 26, 1947, and had been placed in the file of appellant prior to the latter date; the only effect of such evidence would be to impeach the testimony of Examiners Leckner and Woodward.

In order to require the production of documents in the files of the government for the purposes of impeach-

ment, sufficient foundation must be laid during the course of cross-examination. A comparison of the Supreme Court cases of *Goldman v. United States,* 316 U. S. 129 (1942), and *Gordon v. United States* 344 U. S. 414 (1953), illustrates this rule. In the *Goldman* case the defendants demanded that they be permitted to inspect the notes and memoranda made by federal agents, the agents having admitted that they refreshed their recollection from these papers prior to testifying. The Supreme Court held that there was no error in denying the inspection of the witnesses' memoranda, because (p. 132):

> "We think it the better rule that where a witness does not use his notes or memoranda in court, *a party has no absolute right to have them produced and to inspect them.* Where, as here, they are not only the witness' notes *but are also part of the Government's files, a large discretion must be allowed the trial judge.* We are unwilling to hold that the discretion was abused in this case." (Emphasis added.)

In the *Gordon* case, the Supreme Court ruled that production should have been ordered; however, in so doing, the court indicated the type of foundation which must be laid before production becomes a matter of right (pp. 418-419):

> "By proper cross-examination, defense counsel laid a foundation for his demand by showing that the *documents were in existence, were in possession of the Government,* were made by the Government's witness under examination, were *contradictory of his present testimony,* and that the contradiction was as to relevant, important and material matter which

> directly bore on the main issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government *on the chance that something impeaching might turn up.* Nor was this a demand for statements taken from persons or informants not offered as witnesses. The Government did not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise." (Emphasis added.)

In a footnote to the above quotation the Supreme Court distinguished the *Goldman* case in the following language:

> "In Goldman v. United States, 316 U. S. 129, the notes sought to be inspected had neither been used in court, *nor was there any proof that they would show prior inconsistent statements.*" (Emphasis added.)

In the case at bar, appellant did not show that completed forms G-58 and G-59 were in possession of the government at the time of trial; nor did he show that these forms contained impeaching material. Indeed, appellant's argument that refusal to order production of these forms deprived him of the opportunity to show non-reliance rests upon the vaguest suppositions: that the F. B. I. knew or learned of appellant's membership in the Communist Party prior to February 26, 1947; that the F. B. I. recorded this information on forms G-58 and G-59 and returned the latter forms to the Immi-

gration and Naturalization Service prior to February 26, 1947; that the completed forms G-58 and G-59 reached the files of appellant prior to February 26, 1947; that the Naturalization Examiners had this information before them when they acted upon appellant's Petition for Naturalization; and that forms G-58 and G-59 are still in existence and in possession of the Government. It is submitted that these speculations afforded an insufficient foundation for production of the documents demanded (*Lightfoot v. United States,* 24 L. W. 2319 (C. A. 7, 1955), cert. granted 24 L. W. 2319; *Scales v. United States,* 227 F. 2d 581 (C. A. 4, 1955); *Jencks v. United States,* 226 F. 2d 540, 552 and 226 F. 2d 553, 560-561 (C. A. 5, 1955)). *Fisher v. United States,* No. 14731 ..... F. 2d ..... (C. A. 9, Feb. 15, 1956—not yet reported), is distinguishable in that a much more definite and reliable foundation for the production of the documents for impeachment purposes was laid. There, appellant sought the production of the records of the Federal Bureau of Investigation to show the receipts prepared by the F. B. I. which were signed by informer Harley Mores for himself and his wife Mazie Mores for moneys paid them by the F. B. I. from 1942 to 1953 amounting to $10,530, $5,780 being paid from 1950 to May 21, 1953. These matters were undoubtedly brought out upon cross-examination. Thus, the impeaching character of the receipts to show bias was established. In the case at bar, it is only through tenuous speculation that appellant arrives at the conclusion that G-58 and G-59 would show non-reliance by the naturalization examiners.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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